No. 95-813

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

BRAD BENNETT, *et al.*,

Petitioners,

v.

MARVIN PLENERT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE THE NATIONWIDE PUBLIC PROJECTS COALITION, THE NATIONAL RURAL ELECTRIC COOPERATIVE ASS'N., GRANITE CONSTRUCTION CO. (CA), W. SAN BERNARDINO COUNTY (CA) WATER DISTRICT, THE CITY OF SAFFORD (AZ), THE FIRE ISLAND (NY) ASS'N., SEMITROPIC WATER STORAGE DISTRICT (CA), METRO. DENVER WATER AUTHORITY (CO), DRAKE HOMES, INC. (CA), WHEELER-RIDGE MARICOPA WATER STORAGE DISTRICT (CA), SACRAMENTO COUNTY (CA), RESCUE UNION SCHOOL DISTRICT (CA), KERN COUNTY WATER AGENCY (CA), KERN COUNTY (CA), HELIX WATER DISTRICT (CA), AND RANCHO CALIFORNIA WATER DISTRICT (CA) IN SUPPORT OF PETITIONERS

LAWRENCE R. LIEBESMAN
(Counsel of Record)
KENNETH S. KAMLET
LINOWES & BLOCHER, L.L.P.
1010 Wayne Avenue
Silver Spring, MD 20910
(301) 588-8580
Attorneys for Amici Curiae.

May 24, 1996

Washington, D.C. • THIEL PRESS • (202) 328-3286

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

REGULATIONS

MISCELLANEOUS

INTERESTS OF THE AMICI CURIAE

The *amici* are public sector agencies and associations, local governments, and private entities that provide essential services to the public.[1] The *amici* include:

Nationwide Public Projects Coalition (NPPC), a not-for-profit corporation whose members include state, regional and local government agencies and associations, and private sector entities. Its members furnish basic public services such as water supply, irrigation, flood control, transportation and other infrastructure facilities. NPPC strives for balance between environmental protection and the provision of essential public services.

The National Rural Electric Cooperative Association, a not-for-profit national service organization that represents approximately 1000 rural electric cooperatives (RECs) that provide central station electric service to approximately 30 million consumers in 46 states. Over the past five years, RECs have undertaken over 1500 projects--including building and upgrading power generation, administration, and transmission facilities—that require ESA compliance in securing USDA loans or loan guarantees.

Granite Construction Company, a large nationwide contractor and materials supplier to public and private projects that have been delayed and rendered more costly by ESA requirements.

West San Bernardino County Water District (WSBCWD), a public agency established under the California Water Code that provides domestic and fire protection water to 45,000 southern California residents. It

---

[1] The parties have consented to the filing of this brief. The *amici* have filed letters of consent with the Clerk pursuant to this Court's Rule 37.3.

arising from the listing of an endangered fly species. *See infra* at 5-6.

The City of Safford, a municipal corporation in southeast Arizona, that provides water to its 18,000 residents, businesses, churches, schools, a state prison and a community college. A 1993 flood severely damaged their water supply facility. ESA restrictions imposed costly delays on the emergency repair process. *See infra* at 9-10.

The Fire Island Association, Inc., a league of 18 property owner associations located on Fire Island, New York, a roadless barrier island subject to overwashes and breaching from the Atlantic Ocean. The Association is particularly concerned over FWS restrictions to protect the habitat of the endangered Piping Plover, which will prevent or preclude beach nourishment projects needed to prevent storm damage and respond to emergency breaches. *See infra* at 7-8.

Semitropic Water Storage District (STWSD), located in the San Joaquin Valley, supplies irrigation water to 221,000 acres in and around Kern County, California. The ESA has increased STWSD's operation, maintenance, and energy costs for transporting and "banking" water and has required the set-aside of lands for species preservation through the Kern County Habitat Conservation Plan.

Metropolitan Denver Water Authority (MDWA), a political subdivision and public corporation of the State of Colorado. MDWA, made up of 20 local governments working to develop water supplies for the Greater Metropolitan Denver, Colorado area, serves more than 300,000 persons. The permits it needs to construct water facilities in the arid Denver region are subject to frequent ESA regulation.

Drake Homes, Inc., a land development and single-family home construction business, serving northern California. Drake owns several thousand acres in the Chico

Drake Homes, Inc., a land development and single-family home construction business, serving northern California. Drake owns several thousand acres in the Chico area, which contain some 700 acres of "vernal pools" that have historically been habitat for several species of ESA-protected Fairy Shrimp.

Wheeler Ridge-Maricopa Water Storage District (WRMWSD), a water storage district and political subdivision of the State of California, encompassing 228 square miles of agricultural lands south of Bakersfield. WRMWSD Farming activities and water supply facilities have been impacted by the ESA harm" regulation—including negotiations to develop three Habitat Conservation Plans for various portions of Kern County.

Sacramento County (CA), a political subdivision of California located in an area known as the "Central Valley," owns or manages large tracts of land which contain "vernal pools," habitat of several species of ESA-listed Fairy Shrimp. Because of the decision to list these species, the County has faced significant problems in implementing land management decisions to protect vernal pools, as well as planning for an important landfill to serve the needs of County residents. *See infra* at 9.

Rescue Union School District, an elementary school district covering 52 square miles of El Dorado County, California, has adopted a $46 million facilities plan to accommodate its rapid growth. The District has experienced significant delays and expense in construction of a new West Campus, which is critical to that plan, because of the need to sample for Fairy Shrimp species which may inhabit numerous "vernal pools" located on the Campus site. *See infra* at 9.

Kern County Water Agency (KCWA), a political subdivision of the State of California, charged with the management of water supply and quality in what was once the third most productive agricultural county in the U.S. Numerous KCWA projects have been delayed, blocked, or made significantly more costly due to legally questionable ESA implementation. For example, ESA-mandated delays in the construction of 19 new wells and the use of various existing wells in areas of *potential* habitat for the ESA-listed Tipton Kangaroo Rat significantly impeded KCWA's 1991 Emergency Ground Water Recovery Program.

Kern County (CA) covers more than 8,000 square miles of desert mountain and valley terrain and has a population of more than 600,000. Kern County has 20 ESA-listed species and has had to expend considerable funds to protect such species, including $26 million per year for the Southwestern Willow Flycatcher, resulting in increased water and electric rates for County residents.

Helix Water District, serving 50 square miles and a quarter million people in the heart of San Diego County, California. To satisfy federal drinking water requirements and meet future demands, Helix must expand the capacity of its treatment plant to106 million gallons per day. In connection with the expansion, Helix is required to purchase land, requiring perpetual payments for maintenance, as part of an expensive mitigation program for an endangered bird species.

Rancho California Water District (RCWD) provides water and sewer service over a 150 square mile area in southwestern Riverside County, California. Sixty thousand residents and 18,000 businesses rely on RCWD for potable water. The ESA has delayed and driven up

costs on numerous capital improvement projects undertaken by RCWD.

The impact of this case on the *amici*, and on the public they serve, is potentially massive. Over-regulation by the Fish and Wildlife Service (FWS) of hypothetical "takes" of species under its "harm" regulation; unnecessary and scientifically insupportable listings of species; and unjustifiably onerous jeopardy determinations and biological opinions, all affect public and private uses of land and water resources throughout the United States. If impacted public agencies and private landowners are denied the opportunity to challenge overzealous regulation under the ESA, severe negative consequences will result. The *amici* submit several examples of apparent FWS abuses of authority—which, if the *Bennett* decision is upheld, will continue unchecked and be encouraged to proliferate:

1. *West San Bernardino County Water District (Water District):* In the summer of 1993, the Water District determined that it needed to locate a domestic water supply well to respond to a prevailing drought. Between the time a well was drilled in the City of Rialto and ancillary equipment and user connections were installed, FWS announced the listing of the Delhi Sands Flower-Loving Fly (the Fly) as an endangered species. 58 Fed. Reg. 49,887 (Sept. 23, 1993). FWS subsequently advised the District it would prohibit all activities on the well site, pursuant to its "policy...to consider all areas on Delhi Sands with suitable...habitat *as occupied*" by the Fly—while admitting that its experts could find no Flies on the Lot in 1994. FWS warned the Water District that any disturbance of the "habitat" on the 80' by 120' Lot would "take" the Fly and violate ESA § 9. The Water District's

entomologist determined that no flies existed on the site, that the nearest Fly nest was over half a mile away, and that the site, at best, contained degraded habitat. Although the ESA directs that listing, habitat designation, and interagency consultations be carried out using "best available scientific data,"[2] under the ruling below, the Water District would be powerless to challenge FWS's actions as lacking adequate scientific support.[3]

2. *Los Angeles County Department of Public Works (LACDPW):* In June 1992, LACDPW (a member of NPPC, but not itself separately an *amicus*) developed the San Gabriel Canyon Sediment Management Plan (SMP) to remove sediment from a system of three reservoirs operated by LACDPW. These aging reservoirs have lost approximately 25% of their original storage and flood protection capacity from sediment deposition. If more sediment is allowed to accumulate, there is a danger that runoff from a major storm would exceed the channel's design capacity and cause extensive flood damage.

Without any evidence of species present, FWS criticized LACDPW's preferred sediment management alternative, speculating that there might be impacts on potential habitat of the Least Bell's Vireo (an ESA-listed endangered bird species; *see* 51 Fed. Reg. 16,482 (May 2, 1986)) and on the Two-Striped Garter Snake (a species proposed for listing under the ESA).

---

[2] 16 USC §1533(b)(1)(A)(listing determinations); *id.* §1533(b)(2) (critical habitat designations); *id.* §1536(a)(2) (interagency cooperation).

[3] The National Association of Home Builders recently filed suit challenging the listing of the Fly. *National Ass'n of Home Builders. v. Babbitt*, C.A. No. 1: 95 CV 01973 (RMV) (D.D.C.) (pending).

LACDPW then performed additional environmental analyses (at a taxpayer cost of an additional $151,000) demonstrating that the project area was uninhabited by either Snake or Bird. In response, FWS demanded more field surveys for other endangered, threatened and candidate species, and insisted that the County select the most expensive alternative: construction of a slurry pipeline at an anticipated cost of $164 million—ten times the cost of the County's preferred alternative.

While FWS continues to require more data on more species that "may occur" in the area, the public safety of L.A. County residents is being compromised by the delay in completing this critically-needed project. Because LACDPW cannot finance FWS's preferred alternative and required mitigation, it may be forced to remove one or more of the reservoirs from service. The *Bennett* decision would foreclose any avenue of legal challenge to these FWS determinations.

3. *Fire Island, New York:* The south shore communities of Long Island, NY, including the incorporated Villages of Ocean Beach and Saltaire on Fire Island, have been ravaged by harsh storms in recent years. The winter nor'easters of 1992-93 caused over $230 million in damage to homes, businesses and infrastructure in the downstate region. Fire Island, one of the barrier islands protecting the Long Island mainland and the Great South Bay (a major shellfishery and recreational resource) from the Atlantic Ocean, has endured significant erosion damage due to such storms. As a result, serious "breaches"[4] of Fire Island from Atlantic inundation are an

---

[4] Barrier islands like Fire Island are narrow and can be overwashed by ocean waves in severe coastal storms. Unattended overwashes become "breaches," wherein water flows at shallow depths from ocean to bay continuously at low tide. Breaches, in turn, are widened and deepened by

imminent possibility. As breaches get larger, they can quickly become new "inlets," splitting the barrier island in half.

In 1994, a Task Force appointed by then-Governor Cuomo endorsed a Corps of Engineers plan to provide emergency beach nourishment (Breach Contingency Plan), for barrier islands overwashed by Atlantic storms, while providing special protection for the ESA-listed Piping Plover and other species. In addition, an interim beach nourishment program for Fire Island is being advanced by the Corps of Engineers, pending completion of the Corps' long-term $14 million "Reformulation" study covering an 83-mile coastal stretch.

FWS now objects to the placement of sand under the Interim Plan in some areas of the Fire Island National Seashore (FINS), out of concern for actual or possible Plover habitat The Association is very concerned that the FWS's refusal to allow the emergency placement of sand along parts of the FINS, pending completion of the long-term study, could make a breach more likely to occur, and cause significant delays in reaching a permanent solution to these problems. This could result in millions of dollars in damage to property and infrastructure, and pose threats to public safety. The *Bennett* decision would leave the Association without any recourse to contest FWS's decisions.

4. *Abuses Related to the Fairy Shrimp:* The listing of several species of fly-sized crustaceans known as Fairy Shrimp (*see* 59 Fed. Reg. 48,136 (Sept. 19, 1994)), has

(..continued)

natural hydraulic forces and can quickly become new "inlets," or passageways between two islands connecting ocean to bay.

had a major impact on property owners in California's Central Valley.

Amici Sacramento County and the Rescue Union School District have been forced to battle FWS over listing of the Shrimp. The County has incurred substantial costs and delays to sample numerous vernal pools for the presence of these species before it could move forward with a vital landfill project. Increased costs will likely be passed on to County residents, and the delays have heightened concern over the adequacy of refuse disposal services. Moreover, the Fairy Shrimp listing has impeded the County's own land use program to manage vernal pool habitat within its jurisdiction. The School District has also experienced substantial expense from the Fairy Shrimp listing. The District has been required to hire a biologist and sample a single vernal pool on its property 17 times, before it could proceed with an expansion to its campus. No Shrimp were ever located. This has delayed the District's program to build a new West Campus, which is critical to the District's $46 million facilities plan to accommodate its rapid growth. The County and the School District are among the plaintiffs in pending litigation with the FWS over the decision to list the species.[5]

5. *City of Safford, Arizona:* The City of Safford is a community of 18,000 whose primary source of water is Bonita Creek. In January 1993, a major flood struck Safford, severely damaging the Bonita Water System. As soon as flood waters receded, the City retained an engineer to make emergency repairs, with the aid of the Federal Emergency Management Agency (FEMA).

---

[5] A coalition of public and private entities, including these *amici*, have filed suit challenging the decision to list these species. *Building Indust. Ass'n. v. Babbitt* (No. 1: 95 CV 00726) (PLF) (D.D.C.) (pending).

FWS brought the project to a halt, because Bonita Creek was designated part of the "critical" habitat of the Razorback Sucker, an endangered fish. *See* 56 Fed. Reg. 54,967 (Oct. 23, 1991). Other federal wildlife officials, however, found that no suckers occupied the Creek after the flood. Yet, FWS insisted that, to prevent "takes" of the fish and their unoccupied habitat, no repair equipment could enter the stream (for fear of crushing nonexistent suckers) and that additional operational restrictions be imposed. FWS's edict to protect absent fish delayed repairs to the Bonita Water System for six months. During this time emergency wells were in operation, at a great cost to the City. Estimated compliance costs exceeded $1 million.

All of these examples bolster *Amici*'s belief that, if the Ninth Circuit's interpretation is upheld, it will be virtually impossible for them to invoke the citizen suit provision of ESA Section 11(g)(1)(C), 16 U.S.C. §1540(g)(1)(C), to require the Secretary to perform nondiscretionary procedural and substantive duties. It will also abrogate the important ESA policy of requiring Federal agencies to cooperatively resolve water resource issues "in concert" with wildlife preservation. 16 U.S.C. §1531(c)(2). If public agencies become powerless to challenge arbitrary decisions of the Secretary, countless hours and millions of tax dollars for vital public works could be needlessly sacrificed.

SUMMARY OF ARGUMENT

1. In making citizen suits available under the ESA to a broad class of "persons," and in authorizing suits to compel the Secretary's performance of nondiscretionary duties

(including the application of procedural safeguards to protect those regulated and affected by the ESA), Congress expressed its clear intent to *not* restrict standing only to "citizen monitors" seeking to promote species conservation.

2. The restrictions imposed by the Ninth Circuit on the right of irrigation districts to challenge defective governmental determinations that result in cutting off their access to vital water resources, are inconsistent with the ESA's express policy of requiring Federal agencies to cooperate with State and local agencies to resolve conflicts between water resource and species conservation issues.

3. Even if the court below correctly applied the "zone of interests" test to Petitioners, it should have found "procedural standing" here. Standing is proper under either the footnote seven test articulated by this Court in *Lujan* (i.e., based on their attempt to vindicate a threatened concrete interest by employing a procedural right conferred under the ESA), or under the D.C. Circuit's approach (*see, e.g., State of Idaho*) of considering both the Petitioners' "proprietary interest" in nearby land (furnishing the requisite concrete interest) and their status as "persons" with authority to sue under the ESA's citizen suit provision. Indeed, the Ninth Circuit has itself elsewhere recognized (in *Douglas County*) that nearby landowners "have 'concrete interests' that give them the right to insure that agencies follow correct procedures."

4. The only way to avoid hopelessly complex standing rules and the appearance of unfair and unequal access to the courts, is to assume that Congress meant what it said.

"Any person" with sufficiently concrete interests at stake may seek judicial redress under 16 U.S.C. §1540(g)(1)(C), to compel the Federal government to follow its mandatory ESA duties. Further, the Ninth Circuit's decision would give the Federal government a "blank check" to arbitrarily ignore the concerns of public agencies in the name of species conservation.

ARGUMENT

I. CONGRESS DID NOT INTEND TO PREVENT CITIZENS FROM CHALLENGING OVERLY ZEALOUS AND UNSCIENTIFIC IMPLEMENTATION OF THE ESA.

When this Court established the "zone of interest" test of prudential standing in *Ass'n of Data Processing Serv. Orgs. Inc. v. Camp*, 397 U.S. 150, 153-54 (1970), it made clear that Congress was free to "resolve [the] question [of standing] one way or another, save as the requirements of Article III dictate otherwise." *Accord Gladstone Realtors v. Bellwood*, 441 U.S. 91, 100 (1976). Congress has done precisely that in the ESA. It has established a broad "citizen suit" provision, which expressly confers the right to sue on "any person" who alleges a violation of the Act or its regulations, 16 U.S.C. §1540(g)(1)(A), or who seeks to compel performance of a nondiscretionary act or duty, 16 U.S.C. §1540(g)(1)(C).[6]

[6] It is only the latter provision that is invoked in the present case. *See*, Complaint, Para. 3, App. 33 (appended to Petition for Writ of Certiorari).

Over the past quarter century, Congress has fashioned numerous "citizen suit" provisions, to promote compliance with the Nation's environmental laws. It has varied the scope of these provisions—sometimes being more narrow, sometimes more expansive. In none of these statutes has Congress ever expressed an intention that only groups serving an environmental agenda have standing to sue. This is illustrated by the tabulation of environmental citizen suit provisions in Appendix A. Indeed, if the Ninth Circuit's decision is upheld, then this Court will promote the position that *only* environmental preservationists have standing to sue under *all* of these statutes.

The vast majority of these provisions have in common a two-pronged thrust directed at (1) enjoining violations of the statute and its implementing regulations, and (2) ensuring that the implementing agency faithfully carries out its nondiscretionary (procedural and substantive) duties. If Congress had intended that only those "citizen monitors" with an interest in promoting species conservation and environmental protection could pursue civil actions under these statutes, it would have allowed citizen suits only to enjoin substantive violations, and not to rectify procedural and substantive deficiencies. It also would have allowed challenges only of violations claimed to impair effectuation of the statutes' environmental protection objectives.[7]

[7] Significant also is the fact that, where Congress sought to restrict the scope of citizen suits, it knew how to do so. For example, one of the citizen suit provisions under TSCA is limited to review of missed deadlines under one section of the Act. *See infra*, Appendix A, at 1.

Congress chose to do neither. That silence speaks volumes and underscores the error of the Ninth Circuit's holding in *Bennett*.

II. THE NINTH CIRCUIT'S OPINION LIMITS COURT REVIEW OF COMPLIANCE WITH THE ESA POLICY THAT FEDERAL AGENCIES "SHALL COOPERATE WITH STATE AND LOCAL AGENCIES TO RESOLVE WATER RESOURCE ISSUES IN CONCERT WITH CONSERVATION OF ENDANGERED SPECIES."

The Ninth Circuit focuses on Section 2(b), 16 U.S.C. §1531(b), to support the proposition that only species conservation interests may be asserted in ESA citizen suits. This ignores the clear mandate of Section 2(c)(2) that Federal species protection duties be coordinated and reconciled with state and local water resource concerns.[8] 16 U.S.C. §1531(c)(2). Indeed, by its use of mandatory language, Section 2(c)(2) creates a non-discretionary duty: "*Federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species*." (Emphasis added.) In administering the ESA, all Federal agencies, including the FWS, must comply with this section. This procedural obligation to resolve competing species protection and water resource concerns is precisely the kind of duty intended to be enforced under Section 11(g)(1)(C) of the ESA's citizen suit provision.

[8] Elsewhere, the ESA also directs that, "...the Secretary shall cooperate to the maximum extent practicable with the States." 16 U.S.C. §1535(a).

As noted, "any person" may compel the Secretary to carry out mandatory duties, such as the coordination responsibility found in ESA §2(c)(2). 16 U.S.C. §1540(g)(1)(c). The courts have recognized water agencies to be "persons" with standing to enforce these duties, where they allege the deprivation of water rights due to the failure to comply with the consultation requirements of ESA §2(c) (2). *Westlands Water Dist. v. United States Dep't. of Interior*, 850 F.Supp. 1388 (E.D. Cal. 1994). *See also United States v. Glenn-Colusa Irrigation Dist.*, 788 F.Supp. 1126 (E.D.Cal. 1992) ("The Act provides that federal agencies should cooperate with state and local authorities to resolve water resource issues regarding the conservation of endangered species...[;] enforcement of the Act does not affect...the manner in which the District exercises [its water] rights....").

It should be noted that the policy behind ESA §2(c)(2) parallels the mandate of Section 101(g) of the Clean Water Act (CWA), 33 U.S.C. §1251(g), which, using very similar language, explicitly directs federal agencies to cooperate with state and local agencies to "develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." As this Court held in *PUD v. Washington Dep't of Ecology*, __U.S.__, 114 S. Ct. 1900 (1994), to assert that the CWA is concerned solely

with water *quality* and does not allow consideration of water *quantity* is an artificial distinction.[9]

Similarly, in this case, to assert that the ESA is solely concerned with species protection without considering state and local water resource needs perverts the Act's clear meaning. There is no ambiguity here—the Ninth Circuit's interpretation is in conflict with the express language of Section 2(c)(2), and precludes the ability of "persons," including public water resource agencies, to vindicate the policy of resolving competing species protection and water resource concerns.

III. THE NINTH CIRCUIT'S RULING WOULD PRECLUDE *AMICI* FROM ASSERTING PROCEDURAL RIGHTS RECOGNIZED IN *LUJAN*, AND THWART *AMICI'S* PROPRIETARY RIGHT TO PROTECT AND MANAGE PUBLIC RESOURCES.

A. Footnote 7 of *Lujan v. Defenders of Wildlife* recognizes standing under the ESA to protect concrete procedural interests.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, n. 7, 8 (1992), this Court acknowledged that plaintiffs

[9] "It is the purpose of this [§ 101(g)] amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations."114 S.Ct. at 1913-14, *referring to and quoting* 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 532 (1978).

living near a proposed federal dam would have "procedural standing" to sue if the licensing agency failed to prepare an Environmental Impact Statement (EIS), even though the EIS might not alter the plans for the dam. The Court indicated that there were two essential elements needed to establish such standing: (1) that the plaintiff is a "person who has been accorded a procedural right to protect [his or her] concrete interests...," and (2) that the plaintiff has "some threatened concrete interest...that is the ultimate basis of [his or her] standing."

In this case, the ESA citizen suit provision accords a right to any "person" to challenge FWS's failure to follow statutorily prescribed procedures, where discrete injury to such persons (distinct from that suffered by the public at large) has been alleged to flow from this failure. The petitioners have properly alleged a very real and imminently "threatened concrete interest: that their use of reservoir water for irrigation and other purposes "will be irreparably damaged by...the unlawful restrictions placed by defendants on the use of [the Clear Lake and Gerber reservoirs]." Complaint, Para. 6.

The Ninth Circuit, in construing the *Lujan* criteria for procedural standing, has erroneously enlarged these criteria by specifying that the "threatened concrete interest" must also fall within the "zone of interests" that the challenged statute is designed to protect. *See, e.g., Douglas County v. Babbitt*, 48 F.3d 1495, 1500-01 (9th Cir. 1995), citing *Pacific NW Generating Co-Op v. Brown*, 38 F.3d 1443, 1450 (1994), and *Friends of the Earth v. United States Navy*, 841 F.2d 927, 932 (9th Cir. 1988). However, in *Douglas County*, the same Court found that the County's "proprietary interest in its lands

adjacent to the critical habitat," supplied the "concrete, plausible interests, within NEPA's zone of concern for the environment, which underlie the County's asserted procedural interests." *Douglas County*, 48 F.3d, at 1501.[10] In this case, as in *Douglas County*, Petitioners have a proprietary interest in access to reservoir water—which furnishes the requisite "concrete, plausible interest."

Thus, even under the Ninth Circuit's own interpretation of *Lujan* footnote seven, it is inexplicable how it can also view the interests of the current Petitioners—local irrigation districts and private ranchers whose primary supply of irrigation water is affected by the Respondents' Klamath project biological opinion—as meeting procedural standing requirements any less than the plaintiffs in *Douglas County*. There can be no question that the irrigation districts and ranchers have "some threatened concrete interest"—they face the curtailment of some or all of the irrigation water on which they vitally depend. It is equally clear that they are seeking to invoke "a procedural right" granted by the ESA to protect this concrete interest—specifically, the right to have FWS

[10] Similarly, the Ninth Circuit found that plaintiffs with an economic interest in preserving salmon have a procedural interest in ensuring that the ESA is followed (*Pacific Northwest, supra*); that residents living near the site of a proposed port have procedural standing to sue over the Navy's alleged failure to following applicable permitting regulations (*Friends of the Earth, supra*); that the State of California has procedural standing to challenge the adequacy of an EIS on the Forest Service's land allocation (*State of California v. Block*, 690 F.2d 753, 776 (9th Cir. 1982)); and that a city near a proposed freeway interchange has procedural standing to challenge an agency's failure to prepare an EIS (*Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)).

biological opinions and critical habitat designations based on "the best scientific and commercial data available," and only after considering relevant economic and other impacts. 16 U.S.C. §1533(b)(2). They also have the right to a legally sufficient statement of "reasonable and prudent measures," where a jeopardy determination is made that curtails their access to irrigation water. 16 U.S.C. §1536(b)(4)(C)(ii). In vindicating these procedural requirements, no environmental advocacy organization could possess a remotely comparable "concrete interest."

Here, the petitioners have a concrete interest in water. While the interest at stake in *Douglas County* was land, there is no difference between the interests being vindicated of the sort that would justify denying standing in one case and affirming it in the other.[11]

B. At least one Court of Appeals has also recognized a State's standing to sue under the ESA to protect its proprietary interests as an owner and manager of lands under its jurisdiction.

The Ninth Circuit in *Bennett* cites a "division" between the D.C. Circuit and the Eighth Circuit over

[11] The mere fact that *Douglas County* asserted a NEPA violation is not a sufficient distinction. As the Ninth Circuit noted in its decision in *Bennett*, "[w]e see no reason why the ESA should be construed in a different manner from either NEPA or the Clean Water Act." 68 F.3d at 920. If anything, the "zone of interest" requirement should apply more fully to NEPA, which contains no express private right of action (and where review depends on APA §10), than to the ESA, which has its own citizen suit provision.

whether the zone of interests test applies to ESA suits "notwithstanding the citizen-suit provision...." 63 F.3d 915, 918, n. 3. However, even the D.C. Circuit has held that a State can acquire prudential standing to assert an ESA claim simply because of its "proprietary interest" in nearby land, coupled with its status as a "person" with authority to sue under the ESA's citizen suit provision.[12] *Idaho v. ICC*, 35 F.3d 585, 592 (D.C. Cir. 1994) (abandoned rail line approved by ICC passed over state-owned land).

Indeed, the Ninth Circuit itself, in *Douglas County*, recognized that footnote seven in *Lujan* considers property owners near a proposed dam to have standing to challenge an agency's failure to prepare an EIS based "on the fact that people living close to a proposed dam have 'concrete interests' that give them the right to insure that agencies follow correct procedures." 48 F.3d at 1507, n. 4. Yet, the *Bennett* decision essentially denies ESA standing to protect equally concrete proprietary interests of local governments that provide essential public services.

[12] Although the court found the State's management of the adjoining land for wildlife protection enhanced its "reliability" as a plaintiff in promoting the public interest, Judge Buckley writing, for a unanimous panel, held that the State's prudential standing was reinforced by the fact that the ESA's citizen suit provision specifically authorizes a State to bring an action...by defining "persons" authorized to bring actions to include "any State." *Id.*

IV. EVEN THE NINTH CIRCUIT, CONSISTENT WITH THE RULINGS OF THIS COURT, HAS ACKNOWLEDGED THAT THE "ZONE OF INTEREST" TEST IS NOT ONE OF "UNIVERSAL APPLICATION" IN CASES WHICH DO NOT REQUIRE REVIEW IN ACCORDANCE WITH THE ADMINISTRATIVE PROCEDURE ACT

The "zone of interest" test traces back to this Court's holding (per Justice Douglas) in *Data Processing*, that providers of data processing services had standing to challenge a ruling under the Bank Service Corporation Act and the National Bank Act, allowing national banks to make data processing services available to their customers and to other banks. 397 U.S. at 153. As the Court made clear, however, the statutes at issue in that case conferred no private right of action; rather, judicial review was provided under Section 10 of the Administrative Procedure Act (APA §10), 5 U.S.C. §702. By contrast: "[A] test... which rests on an explicit provision in a regulatory statute conferring standing and [which] is commonly referred to in terms of allowing suits by 'private attorneys general,' is inapplicable to the present case." *Id.*, 397 U.S. at 153, n. 1. Thus, the "zone of interest" test developed as an evaluation of whether the petitioners "are within that class of 'aggrieved' persons who, under §702 are entitled to judicial review of 'agency action' [under the relevant substantive statute at issue]." 397 U.S. at 157. However, where, as here, the statute itself confers a private right of action, one need look only to the scope of allowable citizen suits (and Article III) under the terms of that statute.

Later, in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395 (1987), this Court confirmed that the *Data Processing* Court had added the "zone of interest" test as a "gloss on the meaning of §702," because "[i]t was thought...that Congress, in enacting §702, had not intended to allow suit by every person suffering injury in fact."[13] It also acknowledged that "[t]he principal cases in which the 'zone of interest' test has been applied are those involving claims under the APA...," noting that the Court might require more from a would-be plaintiff invoking an *implied* private right of action under a statute "in conditions that make the APA inapplicable." 479 U.S. at 400, n. 16. Clearly, the same logic dictates that a lesser test (or none at all) might be applied where Congress has specified the intended scope of private actions in an *explicit* and self-contained citizen suit provision.

The Ninth Circuit, in its decision below, acknowledged this Court's instruction in *Clarke* that the "zone of interest" test is *not* one of "universal application" in cases brought under statutes other than the APA.[14] 63 F.3d 915, 917 (9th Cir. 1995). And, in *Douglas*

[13] Moreover, to establish a right to relief under 5 U.S.C. §702, one must show (1) that he has been affected by some "agency action," as defined by 5 U.S.C. §551(13), and (2) he must prove that he is "adversely affected or aggrieved" by that action "within the meaning of the relevant statute,"—"which requires a showing that the injury complained of falls within the 'zone of interests' sought to be protected by the [underlying statutes]." *Lujan v. NWF*, 497 U.S. 871, 883 (1990).

[14] However, the Ninth Circuit notes that, "[p]erhaps because the [*Clarke*] Court did not proceed to explain how the test might differ when applied to non-APA actions, our court, like most others, has continued to apply the traditional zone of interests test to such actions, as well as to APA cases." *Bennett, supra,* 63 F.3d at 917.

County, 48 F.3d at 1499, the Ninth Circuit held that "a plaintiff challenging a statutory provision *under the Administrative Procedure Act*...must show that the injury he or she has suffered falls within the 'zone of interests' that the statute was designed to protect" [emphasis added]—clearly implying that the "zone of interest" inquiry need not necessarily be made in a non-APA challenge.

Similarly, the D.C. Circuit has differentiated, in considering the applicability of prudential standing requirements, between statutes (such as the Resource Conservation and Recovery Act (RCRA)) providing for judicial review under the APA, and those (such as the Energy Policy and Conservation Act of 1975 and the ESA), which do not:

> ...Section 702 of the [APA] provides for judicial review at the behest of any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action," 5 U.S.C. §702, and the Supreme Court has repeatedly held, both before and after [the D.C. Circuit's earlier case under the Energy Policy Act], that prudential limitations apply to review of agency action under that section. [Citations omitted.]....

Hazardous Waste Treatment Council v. EPA, 885 F.2d 918, 921 (D.C. Cir. 1989). The D.C. Circuit, therefore, found prudential limitations "inescapably applicable" to the RCRA case before it, because RCRA provides for judicial review in accordance with the APA. *Id.*

Congress was very explicit and selective in specifying which citizen suit provisions were to give rise to judicial review in accordance with APA and which were not. As indicated in Appendix A, certain citizen suit provisions were made subject to APA standards of review. Others were not. Still others were made subject in part to the APA.

Therefore, it follows that cases arising under the ESA's citizen suit provision, *which do not provide for judicial review in accordance with the APA*, need not apply the "zone of interest" test (at least not to the same extent).[15]

V. FUNDAMENTAL FAIRNESS AND MAINTAINING COMPREHENSIBLE RULES OF COURT ACCESS DICTATE REVERSAL OF THE NINTH CIRCUIT'S DECISION.

A. The "zone of interest" test as applied by the Ninth Circuit creates convoluted distinctions among classes of affected persons and should be discarded where, as here, citizen suit jurisdiction is sought to compel the performance of non-discretionary statutory duties.

Beyond the Circuit Court conflict that led this Court to grant *certiorari* in this case, judicial decisions on

[15] Unlike RCRA, which specifies that "[a]ny judicial review of final regulations promulgated pursuant to this chapter... shall be in accordance with sections 701 through 706 of title 5...," 42 U.S.C. §6976(a), the counterpart ESA provision, 16 U.S.C. §1540(g)(1), simply confers jurisdiction on the district courts without any reference to the APA. It is not relevant that the complaint in this case alleged violations of the APA, as well as the ESA and NEPA, because the prudential standing issues before this Court are confined to those presented under Subparagraph (C) of the ESA's citizen suit provision.

the applicability of the "zone of interest" test to ESA cases have been confusing and inconsistent. This is illustrated by the table in Appendix B.

The Ninth Circuit's approach creates irrational and convoluted distinctions among interested and affected persons. For example, the *Bennett* panel cites *Pacific Northwest*, *supra*, in distinguishing between persons with environmental interests, who have standing, and those with economic interests, who do not. But, this merely underscores the confusing and inconsistent pattern of ESA (and other environmental) standing decisions by the Ninth Circuit and other courts. (*See, e.g., table in Appendix B).* As *Pacific Northwest* recognized, even those with economic interests may have standing ("a narrow or cynical understanding of economic interest is not decisive" [38 F.3d at 1065]), as long as the economic interest parallels the ESA's species preservation objectives. Thus, in the Ninth Circuit's view, hydropower users come within the Act's zone of interests when they sue to enforce stronger protections for listed salmon species, so that the water on which they depend for their economic livelihoods does not need to be diverted for the well-being of the salmon. *Id.* But, if the same hydropower users, with the same interest in getting more of the water shared with listed species, employed a different legal theory—*i.e.*, that diversion of water to protect the species is scientifically unnecessary—then the Ninth Circuit would hold [as in *Bennett*] that they were not within the ESA's zone of interests.

In a similar vein, the Ninth Circuit would recognize the standing of a mink coat manufacturer to promote the preservation of mink (even though that interest is not only

economic but consumptive)—while, presumably denying the standing of a timber harvester, also seeking to protect his livelihood, where the harvesting of the timber might incidentally reduce the habitat of birds nesting or feeding therein. *See, Pacific Northwest*, 38 F.3d at 1065.

When a court-established rule, like the "zone of interest" test, requires ever-increasing court time to decipher and interpret because it is so difficult to apply—especially where Congress has established a broad right of citizen suit—it should be abandoned in favor of affording the full access to the courts intended by Congress.

B. **If the Ninth Circuit's decision is affirmed, State and local governments and public resource agencies could be compelled to expend taxpayers' money without any ability to challenge arbitrary impositions by the Federal government.**

Public resource agencies have a particularly strong claim to access to the courts under the ESA--because they represent a broader public interest and not merely private pecuniary interests; because they are expressly authorized to sue (under the expansive definition of "persons" in the ESA's citizen suit provision); and because the ESA creates a partnership between the Federal government, in vindicating species conservation objectives and State and local governments with interests in the management of land and water resources.

The opinion below would effectively shield from judicial review, all efforts by public agencies to contest arbitrary decisions of the Secretary. Under the *Bennett*

holding, FWS could impose increased burdens on taxpayers to meet such ESA requirements as developing Habitat Conservation Plans and restrictions on the use of designated critical habitat, with no right of review. Indeed, public agencies would be unable to contest even the basic decision to list species, which triggers a myriad of obligations. Such challenges have recently led to decisions exposing serious flaws in FWS listing actions, such as failure to make important studies and data available for public review and comment.[16] Surely, Congress could not have sanctioned denial of access to the courts in such cases, in the name of what one court has termed "a form of totalitarian virtue—a concept for which no precedent has been advanced and which is foreign to the rule of law."[17]

CONCLUSION

For the foregoing reasons, the Ninth Circuit erred in concluding, in disregard of the ESA's broad citizen suit provision, that only those "who allege an interest in the preservation of endangered species fall within the zone of interest[s] protected by the ESA" and have standing to sue to enforce its procedures. The Ninth Circuit's position is especially untenable where it precludes access to the courts by adversely affected public resource agencies, which Congress intended play a partnership role with

---

[16] *See, e.g., Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995) (Bruneau Hot Springsnail); *Endangered Species Comm. of the Bldg. Indus. Ass'n. v. Babbitt*, 852 F.Supp. 32 (D.D.C. 1994) (Coastal California Gnatcatcher).

[17] *Mausolf v. Babbitt*, 913 F.Supp. 1334, 1342 (D.Minn. 1996).

FWS, in balancing the public interest in species conservation against that in the effective use and management of water resources. Accordingly, and because it goes beyond the bounds specified by this Court in *Clarke* and *Lujan*, the decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted.

LAWRENCE R. LIEBESMAN
Counsel of Record
KENNETH S. KAMLET
LINOWES & BLOCHER LLP
1010 Wayne Avenue
Silver Spring, MD 20910
(301) 588-8580

Attorneys for Amici Curiae

May 24, 1996

APPENDIX A

CITIZEN SUIT PROVISIONS IN ENVIRONMENTAL STATUTES

Statute (Citation)	Scope of Standing to Sue
[3]Endangered Species Act of 1973, 16 U.S.C. §1540(g)(1)	**"...any person may commence a civil suit on his own behalf—(A) to enjoin any person...who is alleged to be in violation...; or (B) to compel the Secretary to apply...the prohibitions...with respect to the taking of any resident endangered species...; or (C) against the Secretary where there is alleged a failure...to perform any [nondiscretionary] act or duty...."**
[3]Energy Supply & Environmental Coordination Act of 1974, 15 U.S.C. §797(b)(5)	"Any person suffering legal wrong because of any act or practice arising out of any violation of subsection (a)...may bring a civil action"
[2]Toxic Substances Control Act [TSCA], 15 U.S.C. §2619(a)	"...any person may commence a civil action (1) against any person... alleged to be in violation..., or (2) against the Administrator to compel the Administrator to perform any [nondiscretionary] act or duty...."
[2]TSCA, 15 U.S.C. §2647(f)(1)	"Any person may commence a civil action ...to compel the Administrator to meet [§2643] deadlines...."

APPENDIX A (CONTINUED)

Statute (Citation)	Scope of Standing to Sue
[3/]**Surface Mining Control & Reclamation Act of 1977**, 30 U.S.C. §1270(a)	"...any person having an interest which is or may be adversely affected may commence a civil action...to compel compliance with this chapter...."
[3/]**Clean Water Act**, 33 U.S.C. §1365(a)	"...any citizen may commence a civil action...(1) against any person...who is alleged to be in violation..., or (2) against the Administrator where there is alleged a failure...to perform any [nondiscretionary] act or duty...."
[3/]**Marine Protection, Research, and Sanctuaries Act**, 33 U.S.C. §1415(g)(1)	"...any person may commence a civil suit...to enjoin any person...who is alleged to be in violation of any prohibition, limitation, criterion, or permit...."
[3/]**Noise Control Act of 1972**, 42 U.S.C. §4911(a)	"...any person (other than the United States) may commence a civil action...(1) against any person...who is alleged to be in violation..., or (2) against—(A) the Administrator... where there is alleged a failure to perform any [nondiscretionary] act or duty..., or (B) the Administrator of the [FAA]....under section 1431...."

APPENDIX A (CONTINUED)

Statute (Citation)	Scope of Standing to Sue
[1/]**Solid Waste Disposal Act** (RCRA), 42 U.S.C. §6972(a)	"...any person may commence a civil action...(1)(A) against any person... alleged to be in violation of any permit...; or (B) against any person...who has contributed to...imminent and substantial endangerment...; or (2) against the Administrator where there is alleged a failure...to perform any [nondiscretionary] act or duty...."
[2/]**Clean Air Act**, 42 U.S.C. §7604(a)	"...any person may commence a civil action...(1) against any person... alleged to have violated...[an emissions standard or official order], (2) against the Administrator where there is...a failure...to perform any [nondiscretionary] act or duty..., or (3) against any person who proposes...any new or modified major emitting facility without a permit...."
[3/]**CERCLA** (Superfund law), 42 U.S.C. §9659(a)	"...any person may commence a civil action...(1) against any person...who is alleged to be in violation...; or (2) against the President... where there is alleged a failure...to perform any [nondiscretionary] act or duty...."

APPENDIX A (CONTINUED)

Statute (Citation)	Scope of Standing to Sue
[3/]**Emergency Planning and Community Right-to-Know Act of 1986,**[1] 42 U.S.C. §11046(a)(1)	"...any person may commence a civil action...against...: (A) An owner or operator...for failure to...(B) The Administrator for failure to... (C) [Various officials] for failure to provide a mechanism for public availability of information.... (D) Certain State officials] for failure to respond to a request for tier II information...."
[3/]**Act to Prevent Pollution from Ships,** 33 U.S.C. §1910(a)	"any person may bring an action...(1) against any person...; (2) against the Secretary where there is alleged a failure...to perform any [nondiscretionary] act or duty; (3) against the Secretary of the Treasury when there is alleged a failure...to take action under section 1908(e)...."
[2/]**Public Health Service Act,** 42 U.S.C. §300j-8(a)	"...any person may commence a civil action...(1) against any person..., or (2) against the Administrator where there is alleged a failure...to perform any [nondiscretionary] act or duty...."

Endnote:

NOTES REGARDING APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT JUDICIAL REVIEW PROVISIONS TO CITIZEN SUITS:

[1/] Statute calls for judicial review in accordance with 5 U.S.C. §§701-706.

[2/] Statute calls for judicial review of only specified provisions in accordance with 5 U.S.C. §§701-706.

[3/] Statute does not call for judicial review of any provisions in accordance with 5 U.S.C. §§701-706.

APPENDIX B

DECISIONS FINDING EXPLICIT OR IMPLICIT STANDING IN CASES UNDER VARIOUS ESA PROVISIONS

Asserted Interest	Standing?	Rationale (Reference)
Section 4:		
County challenges procedural defects in critical habitat designation for Northern Spotted Owl, alleging a threat of disease, insects, and fire to adjoining County lands	Yes	"The County has a procedural right, as well as a concrete interest that could be harmed by the critical habitat designation, and that interest is within the zone of interests protected by NEPA." [*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995)]
Farm group challenges procedural defects in the listing of the Bruneau Hot Springsnail (based on harm to farmers' property interests)	Implicit	Standing was not discussed. [*Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995)].

APPENDIX B (CONTINUED)

Asserted Interest	Standing?	Rationale (Reference)
Builders challenge listing of the Coastal California Gnatcatcher based on a dubious scientific study (based on harm to property interests)	Implicit	Standing was not discussed. [*Endangered Species Comm. of the Bldg. Indus. Ass'n v. Babbitt*, 852 F.Supp. 32 (D.D.C. 1994)]
City challenges the emergency listing of the Desert Tortoise as scientifically defective and arbitrary (based on harm to property interests)	Implicit	Standing was not discussed. [*Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989)].
Farming interests challenge decision to list four species of Snake River mollusks (based on the threat to water rights and necessary farming and ranching practices)	No	"[W]here the only injury [is]...additional costs to business operations, and where such harm cannot be relieved by preserving the species, such a claim is not within the [ESA's] 'zone of interests'...." [*Idaho Farm Bureau Fed'n v. Babbitt*, 900 F.Supp. 1349, 1358 (D.Idaho 1995)].

APPENDIX B (CONTINUED)

Asserted Interest	Standing?	Rationale (Reference)
Section 7		
Hydropower users seek to avoid need for economically hurtful water diversions by seeking stronger protections of listed salmon	Yes	"a narrow or cynical understanding of economic interest is not decisive" even though salmon extinction would serve plaintiffs' economic interests as well as species restoration. [*Pacific Northwest, supra,* 38 F.3d 1058 (9th Cir. 1994)].
Water users seek to avoid economically hurtful water impoundments by challenging their scientific basis	No	"Only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA" [*Bennett v. Plenert*, supra].

APPENDIX B (CONTINUED)

Asserted Interest	Standing?	Rationale (Reference)
Timber companies challenge as procedurally defective measures embodied in management plan to protect the Red-Cockaded Woodpecker (based on alleged economic, quality of life, and environmental injuries)	No	"[T]he injuries asserted...are generalized grievances which...are not peculiar to [the plaintiffs]...but rather are shared by all citizens." None of the alleged injuries "constitute injury to a separate concrete interest." [*Region 8 Forest Serv. Timber Purchasers v. Alcock*, 993 F.2d 800, 810 (11th Cir. 1993)].
Snowmobilers challenge closure of Park trails (to protect wolves and eagles from disturbance) as preventing them from observing wolves in their natural habitat and lacking a proper basis under the ESA	Yes	"Although plaintiffs' immediate concern may not be protection of wolves or their habitat, the desire to observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing." [*Mausolf v. Babbitt*, 913 F.Supp. 1334 (D.Minn. 1996)].

APPENDIX B (CONTINUED)

Asserted Interest	Standing?	Rationale (Reference)
Section 9:		
Loggers and landowners challenge the statutory validity of the DOI regulation defining "harm" to include habitat modification, because applying it to the Red-Cockaded Woodpecker and the Northern Spotted Owl harmed them economically	Implicit	"[W]e must assume arguendo that [the respondents' continuation of otherwise lawful logging activities] will have the effect... of detrimentally changing the natural habitat of both listed species and that, as a consequence, members of those species will be killed or injured." [*Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, __U.S. ___, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995)].